UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ST. ANTHONY COMMUNITY HOSPITAL

and **Case 02-CA-278511**

1199SEIU UNITED HEALTHCARE WORKERS EAST

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DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. This is the case of an employee, Andrea Roe, who was discharged by the Respondent, St. Anthony Community Hospital, shortly after she led a successful organizing campaign. The Respondent contends that it discharged Roe for violating the Health Insurance Portability and Accountability Act (HIPAA) by accessing and then disclosing patient information to her mother-in-law. The General Counsel contends that the Respondent's stated explanation for discharging Roe was a mere pretext for a discharge based on her support for and activity on behalf of the Union, 1199SEIU United Healthcare Workers East. The General Counsel also contends that the Respondent interrogated an employee by asking her to identify the "ringleader" of the organizing campaign. As discussed below, I find that the Respondent violated the Act as alleged in the complaint.

The charge was filed on June 10, 2021.[1] The complaint issued on November 24 and a first amended complaint issued on December 9. The Respondent filed an answer to the first amended complaint on December 23 and an amended answer on March 16, 2022. This case was tried before me by Zoom virtual technology on March 29 and March 31, 2022.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs filed by the General Counsel, the Respondent, and the Union, I render these

[1] All dates refer to 2021 unless stated otherwise.

FINDINGS OF FACT[2]

JURISDICTION

Based on the pleadings,[3] at all material times, I find as follows: The Respondent is a not-for-profit New York acute care hospital located at 15 Maple Ave., Warwick, New York. The Respondent is a health care institution within the meaning of Section 2(14) of the Act. Annually, in the course and conduct of its business operations, the Respondent derives gross revenues in excess of $250,000 and purchases and receives at its New York facility goods and materials in excess of $5,000 directly from suppliers located outside the state of New York. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The dispute affects commerce and the Board has jurisdiction under 10(a) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

Roe and the Respondent's Operation

The Respondent is one of three hospitals in the Bon Secours Charity Health System (Bon Secours). The other two hospitals are Good Samaritan Hospital and Bon Secours Community Hospital. Bon Secours is part of the Westchester Medical Health System (WMHS). (Tr. 116, 122, 249)

The Respondent hired Roe as a file clerk in 2005 and promoted her to radiology technician in 2006. Roe generally worked three 12-hour shifts (8 a.m. to 8 p.m.) per week. The Respondent traditionally staffed about five radiology techs per shift, but that number was reduced to about three in the winter/spring of 2021 due to COVID related absences. Roe testified that the number of patients in the hospital probably increased during the pandemic and tasks often took more time. For example, techs needed to dress in personal protective equipment and spent more time disinfecting rooms and equipment. (Tr. 37, 39, 41-43)

Roe's duties included the performance of X-rays and CAT scans, transporting patients, assisting radiologists, obtaining imaging studies, entering and accessing information in patients' electronic medical charts, and answering questions from doctors and nurses. Doctors and nurses from various departments called Roe on a near daily basis regarding imaging that was or would be done on a patient. Roe received such questions regarding patients she did not necessarily perform the X-ray or CAT scan on herself. Roe accessed the patient's medical

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[2] The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent evidence of a fact is trustworthy and not contested, the fact is generally stated without reference to the underlying evidence. Testimony contrary to my findings has been discredited. In assessing credibility, I rely upon witness demeanor. I also consider the context of witness' testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003).

[3] Board rule 102.20 provides that "any allegation in the complaint not specifically denied or explained in an answer . . . will be deemed to be admitted to be true and will be so found by the Board, unless good cause to the contrary is shown." "Any allegation" includes an allegation that states a legal conclusion. *Superior Technology, Inc.*, 305 NLRB No. 121 (1991).

records in order to answer these questions. It was most common for Roe to receive these calls in the morning when doctors and nurses started their shifts and attempted to determine what procedures were or would be done. Roe accessed patient medical records all day long. (Tr. 38-39, 63-64, 97-99)

Roe worked with about 20 to 30 patients per day and sometimes paired up with other techs to perform X-rays and CAT scans. For example, one tech might work directly with the patient while the other tech worked with the equipment and entered information in the hospital's charting system. As a result, medical records might show that a tech only worked with 20 patients in a day even though the tech actually worked with 30 patients. (Tr. 41-43, 259-260)

Roe was supervised by Robert Yates, the Bon Secours director of imaging services. Yates was responsible for all three Bon Secours hospitals and generally worked at the Respondent only two days per week. In addition to his employment with the Respondent, since 2003, Yates worked as a per diem radiology technician for Garnett Health Medical Center (Garnett) and was represented in that position by the Union. Yates retired from his position with the Respondent on August 6 and took a full time radiology technician position with Garnett. Yates has been a radiology technician for 45 years. (Tr. 11, 23, 43, 248-250)

Roe was a good employee who the Respondent wanted to retain and perhaps promote. Yates and Respondent Human Resource Manager Capone both testified to that effect. (Tr. 226, 264-265) Roe had no history of discipline. (Tr. 69) In Roe's December 2019 and 2020 annual appraisals, Yates rated her "exceptional" in job responsibilities. (G.C. Exh. 9) In her 2020 appraisal, Yates commented that Roe "continues to be a self motivated productive technologist. She is always helpful in any way she can. [W]e have had positive comments on her performance from pts. and physicians." In Roe's 2019 appraisal, Yates commented that Roe shows "great pride in consistently performing great work, excellent clinical knowledge" and "overall performance exceeds JD expectations." In the 2019 appraisal, Yates also noted that "Andrea has shown great loyalty and dedication to the organization." (G.C. Exh. 9)

The Union Organizing Campaign and Roe's Discharge

In about the fall of 2020, the Respondent's nurses elected the New York State Nurses Association (NYSNA) as their union bargaining representative. A nurse offered to give Roe's telephone number to a Union representative if the technicians were interested in organizing. Roe asked the nurse to do so. Union representative Anthony Peterson contacted Roe regarding a potential campaign to unionize the technicians. Peterson asked Roe to speak to the radiology techs and create a list of those who were interested in union representation. Roe did so and determined that there was significant support for the Union. In about January, Roe expanded her organizing activity to include departments other than radiology. In late-January or early-February, Union representatives began holding virtual weekly meetings with techs for the purpose of organizing. One employee called into a virtual meeting from work at the hospital and this made Roe nervous. (Tr. 44-54)

Capone initially testified that she believed management became aware of the Union's organizing campaign when the petition was filed on March 4. (Tr. 208-209, 233) (G.C. Exh. 6) However, Capone was copied on emails which indicated that management was aware of organizing activity in February. On February 16, Respondent Vice President/Hospital Administrator Anita Volpe sent the following email to Bon Secours Chief Operating Officer Patrick Schmincke and Bon Secours Senior Human Resources Operations Director Kim Hirkaler (G.C. Exh. 6):

> Just now, Theresa reported that one of her techs, approached her that there was an 1199 meeting via Zoom. I do not have additional details beyond that. I will reach out to the other managers today.

On February 17 (attaching the February 16 email above), Hirkaler and Volpe copied a larger group, including Capone, on the following email exchange (G.C. Exh. 6) (Tr. 145, 207):

> **Hirkaler:** Have you heard anything additional on the below?
>
> **Volpe:** I met with the nurse managers yesterday afternoon. None had heard anything with the exception of Theresa as reported yesterday. I am meeting with the non-nursing unit areas today (1:1) to see if they have heard anything. Would you like to set up a meeting without our leadership to advise them on how to educate their staff?

Yates testified that, during the Union organizing campaign, he acted as a spokesman for the Respondent and interacted with the employees he supervised regarding that topic of unionizing on a weekly basis. Yates held informal meetings in which he gathered as many employees together as possible and handed out flyers designed to convince them to vote against union representation. Yates also verbally communicated that information to the employees. Yates could not necessarily gather all the employees for these meetings because some were busy attending to patients. Accordingly, Yates also attempted to speak with employees individually. Yates reported his interaction with employees to human resources at weekly management meetings. At these meetings, human resources discussed with managers the legal do's and don'ts of a union campaign and provided talking points to convince employees to vote against the union (e.g., payment of dues). (Tr. 228-230, 250-253, 270-274)

On March 24, Volpe sent an email regarding "Union activity" to Hirkaler, copying Capone, which noted that "[o]ne of the EVS staff reported to their supervisor that they see many SACH employees at the Holiday Inn Chester Monday mornings. This employee lives in the area and casually mentioned that he has been [seeing] many staff employees at this location." (G.C. Exh. 3) Volpe assumed it was an NYSNA meeting because the employee saw a nurse, but also indicated in her email that the employee reported seeing a respiratory therapist with the group as well. Volpe stated that she was attempting to determine whether the respiratory therapist was "taking off on Mondays . . .." (G.C. Exh. 3)

On about April 1, Roe spoke to Yates about the Union. According to Roe, Yates was "going around and saying today's the last day . . . that we're allowed to talk to you about the union" and asked "does anybody want to talk[?]" Roe and one other employee agreed to talk to Yates and they went to a quiet makeshift break area to do so. Roe described the conversation as follows: Yates asked Roe what she wanted to talk about and Roe, in reply, asked Yates what he wanted to talk about. Yates said he was against unions because they took employees' dues and provided nothing. Roe disagreed. Roe stated that employees have been asking for more staff and management claims its hands are tied. Roe said a Union would insist on a certain number of techs each day. Roe said the Respondent was one of the lowest paid hospitals in Orange County and the Union could possibly raise wage rates. Roe also said employees would get better benefits like a pension. Yates disagreed and said employees were just being fooled because the Union was going to collect dues and not give them what they want. Ultimately, Yates and Roe agreed to disagree. (Tr. 54-56, 95-96)

Yates testified that he recalled having a conversation with Roe after one of the ad hoc meetings he held with employees. Yates described the conversation as follows (Tr. 265-266):

> [S]he brought up a few points, I think . . . the salary and benefits were part of it. I think she was upset or concerned about that there wasn't adequate management of the department. Because between Janet McComb and I . . . we were covering three places. . . . I don't know if it was called complaining or not, but . . . there are certain things that come up during the day where you need a manager, and at said times there wasn't one there. . . . We had that discussion. . . . I don't remember what else we really talked about.

On April 2, Region 29 mailed ballots to employees for the technician unit election. (Tr. 209) (G.C. Exh. 3 – SACH0000208)

Capone testified that she had "no interest in trying to identify who was part of the organizing campaign." (Tr. 237-238) However, in an April 9 email to managers including Hirkaler and Capone under the subject line "1199 organizers," Volpe wrote that she knew "[Capone] discussed" with Hirkaler the possibility that a certain employee was one of the "1199 organizers." Volpe mentioned four "additional names" as possible organizers. (G.C. Exh. 7) When reminded of these emails at trial, Capone reluctantly admitted that she "potentially" discussed with Hirkaler the identity of an employee suspected of being a union organizer. (Tr. 236-237, 241-242).

In about mid-April, Yates talked to radiology technician Jeanne Saeli alone in his office about the Union. Saeli testified that Yates asked her how she felt about the Union and she replied that she thought it would be a very good thing for employees. Saeli testified that, throughout the conversation, she "got the feeling [Yates] was not a fan." According to Saeli, Yates "asked me who the ringleader was." Saeli testified that she knew Roe was the ringleader but did not tell Yates because she did not want to get Roe in trouble. (Tr. 12-14)

Yates confirmed he had conversations with Saeli about the Union during the organizing campaign, but denied he asked Saeli to identify the ringleader. (Tr. 253) Yates testified, "[n]o . . . that didn't happen. I never . . . really cared who the ringleader was. I never really thought about that. No, I never asked her that." (Tr. 254) When Yates was asked whether he recalled discussing anything with Saeli during the election period, Yates responded (Tr. 254):

> [W]e had some conversations. . . . [W]e talked about . . . the dues paying. I remember we talked about the . . . culture of the organization. . . . [W]e talked about salary and wages . . . we had exchanges and conversation about it, sure.

Respondent's counsel subsequently read from an affidavit Yates provided during the investigation which stated, "I do not recall any one-on-one meetings with Saeli regarding unionization or organizing." (Tr. 257)

On April 15, at 2:25 a.m., a patient in the hospital (referred to on the record as "Mr. F") had an X-ray performed. The X-ray had been ordered by Deogenes Deleon, MD. Roe did not perform the X-ray. (Jt. Exh. 6) (Tr. 153-154) On April 15, at 8:26 a.m., Roe accessed the medical chart of Mr. F and "clicked" on 10 links during a one minute period. (Jt. Exh. 1) (Tr. 164-165, 172-173) Roe testified that she does not recall having done so. (Tr. 63, 90-91)

On about April 27, WMHS Assistant Director of Revenue Integrity Christine Feline went to a chiropractor appointment and was greeted by the receptionist, Donna Roe (Andrea Roe's mother-in-law). Donna asked Feline certain COVID questions including when she was last tested and whether she was tested regularly at the hospital. Feline expressed surprise that

Donna knew she worked at a hospital. Donna said she knew Feline's husband was in the hospital with COVID because "her daughter-in-law worked at St. Anthony's, and she had been updating her on his condition." Feline asked Donna what she meant. Donna said she knows Feline's mother-in-law and her husband knows Feline's husband. Feline asked whether her mother-in-law told Donna about her husband's condition. Donna said, "no, my daughter-in-law is an X-ray tech at St. Anthony's. She has been updating me on his status, on his condition." Donna told Feline her daughter-in-law is Andrea Roe. (Tr. 192-193, 196-202) (R. Exhs. 1-2)

On April 28, Feline reported her exchange with Roe's mother-in-law to then WMHS Vice President of Compliance Valerie Campbell.[4] (Tr. 125-128) The same day, the Respondent performed an audit of Roe's "clicks" into Mr. F's chart from February 1 to April 28. Campbell testified that Roe's access of Mr. F's chart on April 15 at 8:26 a.m. was the only access of concern because Roe did not perform any imaging of Mr. F at that time. Campbell testified that the Respondent takes potential HIPAA violations very seriously. (Tr. 130-136, 159) (Jt. Exh. 1)

On April 30, Region 29 conducted a virtual ballot count for the technician unit election. Roe and Capone participated in the count without video but their names appeared on screen among the participants. Further, in an April 23 email, Hirkaler indicated that Bon Secours Chief Operating Officer Patrick Schmincke intended to attend the ballot count. (G.C. Exh. 7) Roe testified that she was the only employee who participated among about 10-15 people. Capone claimed she did not recall seeing Roe among the ballot count participants. (Tr. 56-58, 86, 209)

On May 4, Yates told Roe she had to attend a meeting with management and could bring somebody with her, such as a union delegate. Roe asked Yates what the meeting was about but he refused to say. The meeting began at about 1 p.m. Present for the employer were Molleda, Capone, and Yates. Roe described the meeting as follows: Management asked whether Roe had someone to represent her. Roe requested more information before deciding who to bring. Molleda said information about the care of an employee's husband was released into the community. Roe called Saeli and asked her to come to the meeting. Saeli did so. Molleda said everything discussed in the meeting was confidential. In response to questioning by Molleda, Roe confirmed that her mother-in-law, Donna, works at a chiropractor's office. Molleda asked Roe whether she knew a Mr. F. Roe said she went to high school with his sister. Molleda said Donna told Feline her daughter-in-law was keeping her updated about Mr. F. Roe told Molleda that this was absolutely not true. Roe said she has worked at the hospital for 15-½ years and never has or would violate HIPAA. Roe said she barely talks to her mother-in-law. Roe also said her in-laws knew from some other source that Mr. F was in the hospital with COVID because she heard them discussing that he (Mr. F) waited too long to go to the hospital. Roe said she thought her father-in-law heard it from a coworker but was not sure. Roe offered to find out, but Molleda told her not to do so. Molleda said they know Roe accessed Mr. F's medical chart and asked her why she did that. Roe said she did not recall doing it but she probably did if he was a patient in the hospital. Saeli said techs often work together on COVID patients with one tech clicking into the chart and the other tech working with the patient. Yates confirmed this. Yates also said techs are often asked by doctors or nurses to go into a patient's chart to check for things like isolation precautions, blood work, previous imaging, and other information. Molleda said they would investigate the matter further and let Roe know when they had a solution. (Tr. 59-64, 90-91)

[4] Campbell testified that, after talking to Feline, she discussed Roe's access of Mr. F's medical chart with WMHS Director of Corporate Compliance Samantha Molleda and members of the Respondent's IT department. This testimony was hearsay and I do not rely on it for the truth of statements allegedly made to Campbell. (Tr. 128-136)

On May 4, at about 4 p.m., another meeting was held regarding a potential HIPAA violation by Roe. Campbell attended this meeting along with the people who attended the 1 p.m. meeting. Roe described the meeting as follows: Campbell provided a recap. Roe said she has worked at the hospital for 15-½ years, knows about HIPAA, and has never violated it. Campbell said she obtained Mr. F's chart for April 15 and presented a document that purported to show how Roe accessed the chart. Campbell asked Roe to explain why she did this. Roe said she never saw anything like the document before. Campbell said that, when Mr. F's name was on a worklist, Roe clicked on the worklist and this would populate the chart. Roe said techs click on the worklist all day long. Campbell said Roe accessed the "storyboard" and generated a report. Roe said she did not know what the storyboard is and does not know how to generate a report. Campbell did not explain what the details of the document meant other than to say Mr. F had an X-ray performed at 2:30 a.m. and Roe accessed Mr. F's chart at 8:30 a.m. Campbell asked Roe why she accessed the chart at that time. Roe said she could have received a call from a doctor or radiologist regarding the X-ray because that happens. Saeli confirmed that this occurs. Roe said, for example, she might be asked to investigate in the medical records whether the X-ray was done in a certain position or if something went wrong which might require the X-ray to be repeated. Roe said all hospital employees enter information in a patient's notes and, if questioned, the tech needs to access those notes to find out what happened. However, the managers simply repeated that they did not understand why Roe had to access Mr. F's notes. Roe said, "I just told you a possible reason why." Capone said they would investigate further and told Roe she was suspended. (Tr. 64-69, 90-91)

Other witnesses did not contradict Roe's testimony regarding these May 4 meetings in any significant way.[5] (Tr. 14-15, 25-26, 59-64, 90-91, 212-215, 258-260) (Jt. Exh. 9) Campbell claimed that Roe offered no explanation why she would have gone into the medical records if she was not performing the imaging on the patient. (Tr. 142-144, 176-177) However, Campbell also admitted that she knew Roe and Saeli both said, in the first meeting, that physicians call techs for information from a patient's medical chart even if the tech did not perform the imaging on that patient. (Tr. 139, 151) Saeli and Yates both confirmed that this occurs. (Tr. 14-16, 34, 267-269) Campbell also claimed that Molleda told her Yates said Roe accessed records not normally accessed by a radiology tech. (Tr. 177) However, Campbell's testimony in this regard was double-hearsay and Yates denied he ever saw the medical information which was accessed by Roe.[6] (Tr. 261, 269-270) Campbell admitted that she told Roe to keep confidential what was discussed at the meetings. (Tr. 154)

After these May 4 meetings, the Respondent did not attempt to determine whether techs other than Roe accessed charts of patients they were not about to X-ray. The Respondent did not ask doctors or nurses, including Dr. Deogenes (who ordered the April 15, 2:25 a.m. X-ray of Mr. F) or any other doctor or nurse who cared for Mr. F, whether they called radiology on April 15. (Tr. 152) Likewise, the Respondent did not attempt to speak with Roe's mother-in-law regarding what she was told about Mr. F and by whom. (Tr. 154)

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[5] There were a few minor differences in testimony regarding who said and did what at which meeting. For example, Saeli testified that, at the 1 p.m. meeting, Capone provided documents which showed how Roe clicked into the medical record of Mr. F. However, Capone testified that she was just a witness at the first meeting. Meanwhile, Roe and Yates testified that Campbell produced these documents at the second meeting. These minor discrepancies do not impact my analysis.

[6] Campbell's testimony was also unreliable hearsay to the extent she claimed that, between May 4 and 7, Molleda said she reviewed Roe's access to patient charts on April 15. Of note, Campbell did not mention this alleged review in her investigation summary. (Tr. 160-161) (Jt. Exh. 14)

On May 6, Roe called Molleda to further explain situations when a tech might access a patient's chart even though the tech did not take an X-ray or CAT scan of that patient. Roe said nurses call and need to know something about an imaging study that was or will be done. For example, a nurse might ask whether the patient can have a CAT scan. To determine the answer, Roe would need to check the patient's history, surgeries, and blood work to determine if the patient can be given contrast. Roe said doctors are not always on site and, therefore, need to call techs for information. For example, the doctor might ask whether the patient is physically capable of lying down flat or standing up to have certain imaging done and the tech would investigate by accessing the patient's medical records. Roe said that the radiology office manager calls techs to relay questions from doctors and nurses regarding imaging studies. Roe noted that if the study was done a day, week, or month ago, the tech would need to read through the medical notes to determine what happened. Roe said a tech will often remain logged in while getting up to do something else and a different tech will sit down at the workstation to complete work on the wrong login ID. Finally, Roe reiterated that she did not remember going into Mr. F's chart but, if she did, there must have been a good reason. Molleda said they reviewed Roe's system access and always saw the same pattern accept in this one instance involving Mr. F. Roe suggested that management talk to Mr. F's doctors and nurses to determine whether they asked Roe to access Mr. F's chart on April 15. Molleda said they would continue investigating and would hopefully have an answer soon. (Tr. 72-74)

On May 7, a managerial conference call was held regarding Roe. Present on the call were Campbell, Capone, Molleda, Volpe, Hirkaler, Schmincke, and counsel Barbara Kukowski, Esq. (Tr. 144-147, 157, 215-217, 230) Yates did not participate. (Tr. 216) Campbell testified that, "as we normally do, we present all the facts of the case, we review the access that the individual made during . . . the date in question, we provide information as to our investigation and . . . our meeting with the individual and what Ms. Roe shared with us, and then a determination is made as to what the appropriate disciplinary action would be for the individual." (Tr. 146) According to Campbell, the group discussed similar cases to ensure that any disciplinary action was consistent and identified one employee who was discharged for accessing and disclosing information. (Tr. 157, 178) However, the Respondent did not actually review personnel files to determine how other employees were treated in similar circumstances. (Tr. 178). According to Campbell, a "preliminary decision" was made by the assembled group to terminate Roe, but "[t]here needed to be further conversations with the VP of HR at the time as well as the CEO for [Bon Secours]." (Tr. 146)

Capone testified that, on the May 7 call, Campbell "discussed . . . what transpired and the access and the verbal breach of the PHI [(Protected Health Information)]. And it was discussed about . . . the consistent practice across the organization in cases like this that we would move forward with a dismissal from employment." (Tr. 216-217) Capone could not recall who among the group was the first to say that Roe should be terminated. (Tr. 230)

Molleda wrote a "Meeting Summary" of the May 7 call in which she stated that the disciplinary recommendation was based on "inappropriate access and potential disclosure to a community member." (Jt. Exh. 10) (Tr. 146-147)

On May 13, Yates called Roe and told her to attend a meeting at the hospital the next day. Yates said Roe could bring anyone she wanted to represent her. (Tr. 76)

On May 14, Roe went to the meeting with Union representative Krystal Shorette. (Tr. 76-78, 92-94) They arrived first and sat in the conference room. Roe described what happened as follows (Tr. 76-78):

> Bob Yates and Yvonne Capone walked in. And as soon as they did, they stopped short, and Yvonne demanded to know who Krystal was. So Krystal told her, I'm Krystal Shorette . . . with 1199. [Capone] told [Shorette], you need to leave immediately. So Krystal said, no, I'm going to stay here and represent Andrea. And Yvonne said, no, 1199 is not allowed to be on the property; you need to leave immediately.

Capone claimed she asked Shorette to leave because certain COVID policies and procedures were in place regarding external visitors.[7] (Tr. 224) Shorette told Roe she could participate in the meeting by speakerphone and left. (Tr. 77, 264) Capone and Yates left as well. Roe testified that hospital policy on visitors changed over time and she did not recall whether restriction were in place on May 14. (Tr. 94) Roe testified that Capone did not tell Shorette to leave because of COVID. (Tr. 93-94) Likewise, Yates did not recall Capone mentioning COVID restrictions. (Tr. 264) Yates returned to the conference room twice after leaving. Roe testified that the first time Yates "came back and asked if Krystal and I walked in together." (Tr. 77)

Yates and Capone returned to the conference room about 20 minutes after they left. Shorette participated in the meeting by speakerphone. Roe testified that Capone said, "we can't just let anybody in for COVID." Roe said Yates told her she could bring anyone she wanted, but Capone claimed it had to be an employee. Capone passed Yates an "Employee Disciplinary Summary" and he read it to Roe. Capone left to make Roe a copy and, when she returned, said Roe would be paid 80 hours for accrued vacation. Capone told Yates he could walk Roe out of the building, but Roe left on her own. (Tr. 77-78, 263) (Jt. Exh. 15)

The disciplinary discharge form contained a checked box that described the reason for termination as "Violation of HIPAA Policies." (Jt. Exh. 15) The discipline described a violation of "Policy 5.2; Standards of Conduct, Section C – Rules of Conduct-Violations-14." As a detailed description of the circumstance or incident, the discipline stated (Jt. Exh. 15):

> Compliance received a call of a potential verbal disclosure of PHI – Protected Health Information on a patient at St. Anthony Community Hospital. On May 4, 2021, a due process was completed with yourself, compliance and HR present. The result of the investigation concluded that on April 15, 2021 you inappropriately accessed a patient record with no business purpose, this access included, ICU Notes, Patient Care Summary and an After Care Visit Summary on a Patient that you did not perform any procedures on that day as well as verbal breech of PHI to one of your family members. You are dismissed from employment effective May 14, 2021.

The Respondent allows certain employees to appeal disciplinary action and Roe did so. (Tr. 79) A conference call was held regarding the appeal. Hirkaler and attorney Allen Liebowitz, Esq. participated for the Respondent. Roe, Shorette, and Union representative Karen Barrett participated for Roe. (Tr. 79-82, 91) Roe testified that Liebowitz was defensive about her participation, but Barrett said it would be good for Roe to explain what happened. Roe explained that she did not disclose any medical information about Mr. F to her mother-in-law

[7] Capone's testimony in this regard was dubious since Yates told Roe she could bring anyone she wanted and, previously, told Roe she could bring a union delegate to the May 4 meeting. Further, Capone did not say anything about COVID when she first encountered Shorette.

and, although she did not recall accessing Mr. F's chart, there were many reasons why a tech might do so. Liebowitz stopped her a couple of times to say, "I don't even understand what you're talking about. I don't know anything about this case." (Tr. 80) Roe asked what investigation had been done and why the hospital did not question her mother-in-law. Liebowitz asked why the hospital would question a non-employee. Roe responded that they should not simply take Feline's word because she works for the hospital. At that point, Roe was asked to leave the call and she did so. (Tr. 81) Roe was subsequently informed by Shorette that the appeal was denied. (Tr. 82)

After Roe's discharge, Saeli and other radiology techs refused to access patient charts if they had not done the imaging on the patient for fear they would be terminated. (Tr. 17) In about early-June, Molleda and Yates met with the radiology techs. A tech asked what would happen if a doctor called about an ultrasound and the tech did not perform the ultrasound. Molleda said the ultrasound techs should field such questions. However, the tech and Yates said ultrasound techs are not present after hours. (Tr. 18) Saeli asked what would happen if she was told to look at a patient's chart for an X-ray even though she did not perform the X-ray. Molleda said, "it's fine as long as it pertains to your job." Saeli asked what would happen if, 2 weeks later (like Roe), she was asked and could not recall how it pertained to her job. Molleda repeated, "it's fine, as long as it pertains to your job." Saeli said, "it's fine, until it's not." (Tr. 19)

On May 24, by email, Hirkaler told Capone the Union accused the Respondent of firing Roe because she was a union organizer. (R. Exh. 3) Capone replied that she thought the organizer was a different employee until "[Shorette] showed up with [Roe] that is when it clicked[.]" (R. Exh. 3) At trial, Capone testified as follows when asked why she thought the other employee was an organizer (Tr. 224-225):

> It . . . was shared by another employee that he had been seen out on the street passing . . . holding literature, and to be honest with you . . . I brushed it off because . . . over the years, he had personal things, so I just assumed that it was a personal.

Capone subsequently testified that, "with all of the personal issues he had, I thought it was a personal, and let it go." (Tr. 243)

At trial, Capone claimed she first learned that Roe was involved in union organizing when Hirkaler sent the May 24 email indicating that the Union said Roe was an organizer. (Tr. 222). Capone testified, "I would've never in my life thought that Andrea Roe would've been" an organizer. (Tr. 222) Capone subsequently confirmed, "I would've never believed that she would have been part of an organizing campaign, just knowing her personally." (Tr. 244-245) When Capone was asked to explain this belief, she answered (Tr. 245):

> I've always looked at her as a caring . . . compassionate person who I felt was committed to the organization, the team that she worked with, dedicated to the time that she worked here, so I'll be honest with you, I would've never thought that she would . . . have been an individual.

On June 18, Molleda sent Mr. F. a letter "regarding a concern related to your Protected Health Information ('PHI')." (R. Exh. 2) The letter stated, "[w]e became aware of this breach on April 28, 2021 which occurred on or around April 27, 2021. A summary of events surrounding the disclosure is as follows: We have learned that a hospital employee inappropriately accessed your medical record. . . . Our investigation also revealed this information may have been disclosed to a community member without your consent." (R. Exh. 3)

On July 6, Molleda drafted a memo which stated (Jt. Exh. 7) (Tr. 181):

> A review was conducted of Andrea Roe's overall access into the medical record system on April 15, 2021. In summary, it was determined there was a pattern of appropriate access for all other patients she saw that day. The only outlier was the access made into [Mr. F's] medical record.

At trial, Campbell testified that the Respondent's IT department looked at how Roe accessed patient medical records and the only indication that "there may" have been inappropriate access occurred on April 15 from 8:25 a.m. to 8:26 a.m. (Tr. 163-165) The Respondent did not look at Roe's access on dates other than April 15 or the computer usage of other radiology techs to determine whether they accessed medical records in a manner similar to Roe. (Tr. 158, 163-164) (Jt. Exh. 2) The Respondent did not call as witnesses its IT employee(s) who performed the digital analysis of Roe's access. Campbell testified that she has no background in radiology and has no reason to believe that the Respondent's IT employees do either. (Tr. 166)

Ultimately, an "Investigation Summary" was prepared which identified Roe as the only individual interviewed during the investigation. (Jt. Exh. 14) (Tr. 181-182) The investigation summary stated as follows:

> **Complaint Summary:**
> The office of Corporate compliance received notification from the wife of an individual who was an inpatient at SACH from [redacted] until [redacted]. The patient's wife, who is an employee of BSCHS, was told by a community member that her daughter in law (Andrea Roe) was keeping her updated on her husband's treatment and status while he was a patient at SACH.
>
> **Investigative findings:**
> The Compliance Office conducted an investigation which included an interview with the employee. In summary, it was determined the employee inappropriately accessed the patient's medical record on 4/15/21 and we believe the patient's PHI was disclosed to her mother-in-law. The patient's information was inappropriately accessed on 4/15/21 between 8:25AM and 8:26AM. Upon review of the . . . access audit and corresponding imaging orders for the patient, it was determined the employee had no business purpose/clinical reason to access the patient's chart.
>
> **Resolution:**
> A Breach Assessment was conducted and as it was determined the risk of identification/disclosure was high, therefore a reportable breach was identified[.] The breach notification letter was mailed to the patient on 6/18/21. The Office of Civil Rights and NY AG's office will be notified during the annual reporting. The employee was terminated on 5/14/21. HIPAA Education was conducted with the SACH Radiology department in June 2021.

On February 18, 2022, the Respondent reported to the New York Attorney General (NYAG) that a HIPAA breach of "Unauthorized Access (Not including Theft, Loss and Hacking)" occurred on April 27. The Respondent did not claim a breach occurred by inappropriate disclosure. The submission certified its truth and acknowledged that any false statements therein were punishable as crimes. (R. Exh. 2)

The Respondent's Discipline of Other Employees for HIPAA Violations

Campbell admitted that the Respondent's Code of Conduct does not require an employee to be fired for violating HIPAA and that not every HIPAA violation has resulted in termination. (Tr. 156) (Jt. Exh. 3) A summary of Bon Secours HIPAA violations from 2017 to 2021 reflects that three employees were discharged for violating HIPAA by the inappropriate disclosure of information and/or unauthorized access. (Jt. Exh. 13) Disciplinary records show that one of those employees was terminated on September 25, 2018 after she twice accessed a co-workers medical chart. (Jt. Exh. 13 – SACH0000014) A second employee was terminated on December 2, 2019 after she "accessed a patient['s] medical record that [she] had no legitimate reason to access and . . . shared information about the patient with another person." (Jt. Exh. 13 – SACH0000012) This is the employee who was identified and discussed by managers during the May 7 conference call regarding Roe. (Tr. 178) A third employee was terminated on August 17, 2020 for sending an email with information about 17 patients to an outside organization and other employees. (Jt. Exh. 13 – SACH0000010)

Beyond these three terminations, 37 other employees received discipline less than discharge for HIPAA violations. The 37 non-termination disciplines break down into the following categories by number (Jt. Exh. 13):

Type of Discipline	Number of Disciplines
Written Caution	13
Written Warning	19
Final Warning and/or Suspension Without Pay	5

Campbell testified that HIPAA violations are considered egregious and grounds for termination if the conduct is intentional rather than inadvertent. (Tr. 180) Disciplinary records did indicate that written cautions and written warnings were largely issued for unintentional disclosures of PHI. However, the Respondent also issued certain final warnings (not terminations) for intentional HIPAA violations.[8] On February 11, 2022, a final warning was issued to an employee who accessed a co-worker's medical record to obtain the phone number of that employee. (Jt. Exh. 13 – SACH0000015) On June 19, 2019, a final warning was issued to an employee for posting information on Facebook that disclosed the admission of a patient and identified the poster as an employee. (Jt. Exh. 13 – SACH0000047-48)

CREDIBILITY

In this section, I address my credibility observations and determinations to the extent they are not addressed elsewhere in this decision.

I found Roe and Saeli to be very credible witnesses. Both employees were clear and detailed in their recollection of events. They were not defensive or adverse to answering questions by the Respondent's counsel on cross examination. They confidently corrected

[8] Although the summary of Bon Secours HIPAA violations identifies five employees who received final warnings and/or a suspension without pay for HIPAA violations, the record contains only three disciplinary records for the same. In addition to the two final warnings described above, the record contains a third final warning which was issued to an employee who repeatedly sent patient information to the incorrect insurance company. (Jt. Exh.13 – SACH0000028-29) The record does not appear to contain the other two disciplinary records. (Jt. Exh. 13)

leading questions to the extent such questions suggested an inaccurate answer but also admitted accurate information and avoided exaggeration. Roe and Saeli appeared committed to their rolls as fact witnesses while leaving advocacy to the lawyers. I note also that Saeli is still employed by the Respondent and employee testimony to the detriment of a current employer is often particularly reliable. See *Flexsteel Industries,* 316 NLRB 745 (1995).

The Respondent's witnesses were less credible than the General Counsel's witnesses. Capone, Campbell, and Yates were not persuasive in their demeanor (appearing hesitant at times in their testimony, reticent to admit certain facts, and lacking detail) and, as discussed below, offered testimony at odds with other evidence.

Although Capone testified that management became aware of Union organizing activity at the hospital when the petition was filed on March 4, Capone was copied on emails which indicate management was aware of such organizing in February. (Tr. 208-209, 233) (G.C. Exh. 6) Although Capone testified that she first learned that Roe was involved in organizing on May 24, when Hirkaler indicated in an email that the Union accused the Respondent of firing Roe because she was an organizer, Capone's reply to the email indicated that she realized Roe was an organizer ("it clicked") when Shorette accompanied Roe to the May 14 meeting. (Tr. 222-224) (R. Exhs. 3) I also find Capone's testimony regarding the May 14 meeting to be telling of her lack of credibility. Capone did not deny Roe's testimony that she initially told Shorette to leave the meeting because "1199 is not allowed to be on the property." Yates did not recall Capone telling Shorette to leave because of COVID. Yates did not deny he told Roe she could bring anyone she wanted to the May 14 meeting or that he told Roe she could attend the May 4 meeting with a union delegate. (Tr. 60) In this context, I do not find Capone's testimony credible to the extent she claimed she asked Shorette to leave because of a COVID restriction. Likewise, I find it telling of Capone's lack of credibility that she denied any "interest in trying to identify who was part of the organizing campaign," since Volpe stated in an April 9 email that she knew "[Capone] discussed" with Hirkaler the possibility that a certain employee was one of the "1199 organizers." (Jt. 7) (Tr. 237-238) When reminded of this email, Capone only reluctantly admitted she "potentially" discussed with Volpe the identity of an employee suspected of being a union organizer. (Tr. 236-237, 241-242).

Although Campbell testified that Molleda talked to IT about Roe's access of Mr. F's chart on April 15, there was no mention of the same in the investigation summary. (Tr. 160-162) (Jt. 14) Although Campbell testified on direct examination that Roe offered no explanation why she accessed Mr. F's medical records on April 15, she admitted on cross examination that Roe and Saeli provided reasons why she would have done so. (Tr. 142-144,151)

Yates testified that he recalled having conversations with Saeli about the Union. However, the Respondent's attorney impeached Yates by having him read a portion of his own investigation affidavit which stated, "I do not recall any one-on-one meetings with Saeli regarding unionization or organizing."[9] (Tr. 253, 256-257) In addition, Yates' recollection of conversations with Roe and Saeli seemed hazy. Yates attempted to talk with all his employees throughout the campaign and he did not appear to have the best recollection of his conversations with these two particular employees. (Tr. 254, 265) Conversely, Roe and Saeli had only one conversation with one supervisor (Yates) about the Union and their recollections of those conversations were far more detailed and appeared superior. (Tr. 12-14, 54-56, 95)

[9] I suspect that Yates simply forgot he made an inaccurate statement in the affidavit and I believe his willingness to make such a statement under oath reflects a general lack of credibility.

I credit Saeli's testimony regarding her conversation with Yates about the Union in which "[h]e asked who the ringleader was." In addition to their general respective credibility (discussed above), I note that Yates turned away when asked about the conversation and answered haltingly. I also found Yates' testimony lacking in credibility to the extent he claimed he never cared or thought about the ringleader. Yates reported his conversations with employees to human resources during weekly managerial meetings and emails revealed that human resources attempted to identify employee organizers. (Jt. Exhs. 6-7).

I credit Roe's testimony regarding her April 1 conversation with Yates about the Union, including her testimony that she disagreed with Yates' opinion that employees should oppose the Union because they would pay dues and receive nothing in return. Roe explained to Yates that the Union could help improve pay, benefits, and staffing. (Tr. 54-56, 95-96)

ANALYSIS

8(a)(1) – Yates Interrogation of Saeli

The General Counsel contends that the Respondent unlawfully interrogated Saeli when, in a conversation about the Union, he asked her "who the ringleader was[?]" As noted above, I credit Saeli's account of the conversation.

The Board will consider the totality of the circumstances in determining whether an employer's questioning of an employee would reasonably tend to restrain, coerce, or interfere with the employee's rights under the Act. *Rossmore House*, 269 NLRB 1176 (1984). In *Camaco Lorain Manufacturing Plant*, 356 NLRB 1182, 1182 (2011), the Board described factors relevant to the *Rossmore House* analysis as follows:

> This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. As to the fifth factor, employee attempts to conceal union support weigh in favor of finding an interrogation unlawful. See, e.g., *Sproule Construction Co.,* 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet,* 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005). The Board also considers whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering,* 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997). These factors "are not to be mechanically applied"; they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House,* supra, 269 NLRB at 1178 fn. 20.

Applying the *Rossmore* standard, I find that Yates unlawfully interrogated Saeli by asking her to identify the ringleader of the union organizing campaign. The background and the nature of the information sought suggest a violation. Emails demonstrate that the Respondent was attempting to identify employee organizers. Capone's testimony also suggested that the Respondent was hostile to such individuals and inclined to discriminate against them. Capone admitted that she suspected a certain employee of being the union organizer but "brushed it off" and "let it go" because he had personal issues. This implies that Capone believed employee

organizing was misconduct she might not "brush off" or "let go" if the employee *did not* have personal problems. Capone also testified that she did not believe Roe would be involved in an organizing campaign because she (Roe) was "compassionate" and "committed to the organization." This implies that Capone believed a person involved in organizing was *not* compassionate and committed to the organization.[10] In this context, Yates' request that Saeli identify the "ringleader" would serve to identify an employee Capone effectively characterized as disloyal. These facts weigh in favor of a violation under *Rossmore*.

The identity of the interrogator, place and method of the questioning, and truthfulness of the response also suggest a violation. Yates was the director of imaging for all three Bon Secours hospitals. Yates initiated a one-on-one conversation with Saeli alone in his office by asking "how she felt about the Union[?]" Although Saeli answered this question truthfully, she did not feel comfortable disclosing that Roe was the "ringleader" because she did not want to get Roe in trouble. Indeed, Yates' characterization of the lead employee organizer as a "ringleader" has a certain negative connotation. And although Roe did not necessarily hide her support for the Union, she did not disclose her participation in union meetings or organizing activities. For example, Roe testified that she felt nervous when an employee accessed a virtual organizing meeting from work. These facts also weigh in favor of a violation under *Rossmore*.

Based upon the foregoing and the totality of the circumstances, I find that the Respondent, by Yates, violated Section 8(a)(1) of the Act by interrogating Saeli regarding the identity of the "ringleader" of the union organizing campaign.

8(a)(3) – Roe Discharge

The General Counsel contends that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Roe because of her union support and activity. The Respondent contends that it lawfully discharged Roe for inappropriately accessing HIPAA protected information and disclosing it to her mother-in-law.

This case must be analyzed under the Board's standard in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). Under this standard, the General Counsel must initially show "that antiunion animus was a substantial or motivating factor in the employment action." *Baptistas Bakery, Inc.*, 352 NLRB 547, 549, fn. 6 (2008). The General Counsel's initial prima facie burden was recently described by the Board in *Wismettac Asian Foods, Inc.*, 371 NLRB No. 9 (2021) as follows:

> [T]he General Counsel has the initial burden of establishing, by a preponderance of the evidence, that [the employee's] protected activity was a motivating factor in the decision to issue the [adverse employment action]. The elements commonly required to support the General Counsel's initial burden [are] (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer. The evidence of animus or hostility must be sufficient to establish a causal relationship between the employee's protected activity and the employer's adverse action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6-8 (2019).

[10] Additional evidence of the Respondent's antiunion animus is addressed in my analysis below of the 8(a)(3) allegation.

The General Counsel's prima facie case may be established by direct and/or circumstantial evidence, including evidence that the employer's stated reasons for discharging an employee were pretextual. *Abbey's Transportation Services, Inc.*, 284 NLRB 698, 701 (1987). Evidence of pretext may include the timing of a discharge, shifting or implausible explanations for the discharge, and a failure to investigate or allow the employee to respond to allegations of misconduct. *Shamrock Foods Co.*, 366 NLRB No. 117 (2018); *Lucky Cab Co.*, 360 NLRB 271, 274-275 (2014); *Grant Prideco, L.P.*, 337 NLRB 99 (2001).

If the General Counsel makes this initial showing, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089. If the Respondent's stated reason for discharging an employee is found to be pretextual and the true motivation is the employee's protected activity, a *Wright Line* "mixed-motive" defense is not available. *Parkview Lounge, LLC*, 366 NLRB No. 71 (2018); *K-Air Corp.*, 360 NLRB 143, 144 (2014).

The General Counsel's Prima Facie Case

I find that the General Counsel has established a strong prima facie case. However, before I work through the legal elements, I emphasize certain facts. Roe worked for the Respondent for over 15 years with no history of discipline. Capone and Yates admitted, and Roe's annual evaluations confirm, that Roe was a good employee who they did not want to fire. In fact, both managers perceived Roe as a candidate for promotion. The events also took place in the context of a COVID pandemic and Roe testified without contradiction that the hospital was short of staff for radiology technicians. Finally, the record does not include any evidence regarding the Respondent's final decision to discharge Roe. Campbell testified that, on May 7, a group of managers discussed a "preliminary decision" to discharge Roe, but "[t]here needed to be further conversations with the VP of HR at the time as well as the CEO for [Bon Secours]." (Tr. 146) In this factual context, I address the General Counsel's prima facie case.

Union Activity and the Respondent's Knowledge of that Activity

The evidence established that the Respondent was aware of Roe's support for and activity on behalf of the Union before she was discharged. As noted above, I credit Roe's testimony that she spoke to Yates and disagreed with his position regarding the Union. Yates told Roe the Union would take employees dues and provide nothing, but Roe disagreed and told Yates the Union could improve employee pay, benefits, and staffing. Yates also admitted that he reported this type of interaction with employees to human resources in weekly managerial meetings. Emails demonstrated that human resources and Volpe were attempting to identify employees engaged in union activity. Accordingly, it can be inferred that management was broadly aware of Roe's conversation with Yates and her feelings about the Union.

I also find knowledge based upon the participation of Capone, Schmincke, and Roe in the virtual ballot count on April 30. Given Capone's general lack of credibility and the fact that human resources was, as noted above, trying to identify employees engaged in union activity, I do not credit Capone's testimony that she did not notice Roe on the count. I note also that a Hirkaler email indicated that Schmincke intended to attend the count and he was not called by the Respondent to deny he was present or deny he saw Roe present.

Lastly, Shorette accompanied Roe to the May 14 meeting with Capone and Yates. Capone told Shorette to leave because "1199 is not allowed to be on the property." Yates later asked Roe to confirm that she "walked in" with Shorette. Thus, the Respondent was aware of this association between Roe and the Union immediately before she was discharged.

Antiunion Animus and Causal Link between Animus and Discharge

The record contains significant evidence that the Respondent was hostile toward union organizing and discharged Roe for her union support and activity. The Respondent's attempt to identify union organizers and Yates' unlawful attempt to have Saeli identify the "ringleader" (a description with a negative connotation) suggests an improper motive. See *City Gas Co.*, 151 NLRB 1064, 1074 (1965) (interrogating employee about the ringleader of organizational activities reflects employer antiunion animus).

Further, as discussed above, Capone's testimony effectively confirmed that the Respondent was hostile toward employees who engaged in organizing activity and inclined to retaliate against them for doing so. Capone testified that she suspected one employee of being a union organizer but only "brushed it off" and "let it go" because he had personal issues. Capone also effectively testified that an employee would not be involved in organizing if she were a "compassionate person" who was "committed" and "dedicated" to the organization. These statements reflect antiunion animus and an inclination to take action against employees perceived to be disloyal because they engage in union organizing.

The Respondent's failure to conduct a thorough investigation into Roe's alleged misconduct is also telling of its actual motive. The Respondent did not determine if techs other than Roe accessed the charts of patients they did not X-ray or scan (even though Roe, Saeli, and Yates all stated that this occurred). The Respondent did not contact Donna Roe about what she was told and by whom. The Respondent did not contact any of Mr. F's doctors and nurses (including the doctor who ordered the X-ray performed on Mr. F on April 15 at 2:25 a.m.) to determine whether they requested that Roe access Mr. F's chart on April 15. Since Roe accessed the medical records in question on April 15 at 8:26 a.m., just after a change in shift (when Roe most often received questions about patients), the hospital could have focused on doctors and nurses who worked with Mr. F and started their shifts at 8 a.m. that day.

Perhaps even more telling of the Respondent's unlawful motive than its failure to conduct a meaningful investigation was management's direction to Roe not to discuss the matter with anyone. Roe specifically offered to find out from her in-laws how they knew Mr. F was in the hospital with COVID but Molleda told her not to do so. This effectively prevented Roe from investigating the issue herself. Although the Respondent might have directed Roe not to disclose PHI, a blanket prohibition against talking to anybody regarding her alleged misconduct was perplexing and possibly unlawful. The prohibition was particularly suspicious since Roe was a good employee the Respondent wanted to retain during a pandemic that caused the hospital to be short staffed. Nevertheless, the Respondent impeded Roe from finding information which may have shown she did nothing wrong.

The Respondent's selective acknowledgement of events also reflects its desire to manufacture a pretextual explanation for a discriminatory discharge. Campbell testified that Roe offered no explanation why she would have accessed Mr. F's chart on April 15 if she did not do the imaging. This is not true. Roe, Saeli, *and Yates* explained that techs are routinely asked to access the charts of patients they do not X-ray or scan. The Respondent simply ignored this explanation and discharged Roe without thoroughly investigating whether Roe was asked to access Mr. F's chart on April 15. Then, after Roe was discharged and techs refused to access the information of such patients for fear of being discharged, the Respondent assured them that they could do so. Again, the Respondent's conduct in this regard is particularly puzzling since Roe was a good employee the Respondent wanted to retain and she was working during a pandemic when the hospital was short staffed.

The Respondent's unlawful motive is also demonstrated by its failure to complete the investigation of Roe's alleged misconduct until a charge was filed on June 10. On July 6, Campbell sent Molleda a memorandum regarding a review of Roe's April 15 access into the medical record system. This belated conclusion to the investigation suggests that the Respondent was not particularly concerned about doing a thorough investigation until it learned that the investigation might need to appear valid when scrutinized in a legal forum. *Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019) (post-termination investigation designed to retroactively justify termination evidenced pretext and animus).

It is further telling of the Respondent's motive that it would not give Roe the benefit of any doubt even though it had every reason to want to retain her. On May 4, Roe vehemently denied she disclosed information to her mother-in-law and explained that her in-laws were aware (from a source other than herself) that Mr. F was in the hospital with COVID. As noted above, Roe specifically offered to find out from her in-laws how they knew this information, but Molleda told her not to do so. The only evidence the Respondent had in support of the disclosure was the second hand account of Feline regarding what Roe's mother-in-law allegedly said. The Respondent seemed to understand that such hearsay would not establish that Roe violated HIPAA since the Respondent reported no such violation to the NYAG. However, the May 14 disciplinary summary stated that Roe was, in part, discharged for "a verbal breach of PHI to one of your family members." It is unclear why the Respondent would assume a breach based on indirect secondary evidence over the firsthand denial of an excellent employee it wanted to retain. Similarly, on May 4, Roe, Saeli, and Yates all explained why Roe might have accessed the records of a patient she did not X-ray or scan. On May 6, Roe specifically asked Molleda to talk to Mr. F's doctors and nurses to determine whether they asked her (Roe) to access Mr. F's chart on April 15. It is appropriate to conclude that the Respondent was simply inclined to ignore such a request and resolve all doubts against Roe, a known Union supporter, after she attended the ballot count (perhaps signifying that she was an organizer).

The timing of events reflects the Respondent's unlawful motive. On April 28, Feline told Campbell that Donna Roe said, "her daughter-in-law worked at St. Anthony's, and she had been updating her on his condition." That same day, the Respondent did an audit of Roe's access into Mr. F's chart. Campbell testified that the Respondent takes allegations of HIPAA violations very seriously. If the Respondent suspected a HIPAA breach or breaches, the logical first step would be to tell Roe to stop "updating" her mother-in-law on a patient's medical condition. However, from April 28 to April 30, the Respondent said nothing to Roe. On April 30, Roe, Capone, and Schmincke participated in the ballot count. It was only after the ballot count that the Respondent, on May 4, talked to Roe about a possible HIPAA violation.

The timing of Roe's discharge was also suspicious. The evidence indicates that a "preliminary decision" was made to discharge Roe on May 7. Although the Respondent did not appear inclined to do Roe any favors after she attended the ballot count, the record does not contain evidence that a final decision was made to discharge Roe before May 14. On May 14, when Capone saw Roe and Shorette in the conference room, Capone told Shorette to leave immediately because the Union was not allowed on the property. In a May 24 email, Capone effectively admitted that she recognized Roe to be a union organizer on, at the latest, May 14 when Shorette "showed up with her." (R. Exh. 3) Capone and Yates then retreated from the conference room, only to have Yates return to ask Roe whether she came to the meeting with Shorette. After confirming that Roe attended the meeting with a Union representative and "it clicked" for Capone that Roe was an organizer, the managers returned and discharged her. This timing suggests a discriminatory motive.

The nature of the Respondent's discharge decision also had characteristics which suggest pretext and antiunion animus. It is noteworthy that the Respondent did not have Yates attend the May 7 meeting in which a preliminary decision was made to discharge Roe. On May 4, Yates largely corroborated Roe's explanations as to why she might have accessed Mr. F's chart on April 15. Accordingly, Yates' presence at the May 7 meeting may have been inconvenient if the goal was simply to justify an unlawful discharge. I also find it suggestive of pretext that, as noted above, the Respondent did not present evidence of the final discharge decision. Rather, the Respondent merely presented evidence of a "preliminary decision."

The failure of attorney Liebowitz to evince any understanding of the disciplinary matter during the conference call regarding Roe's appeal of her discharge also suggests that the hospital was not concerned with anything that might undermine its decision. Liebowitz admitted that he did not understand why it would be relevant that techs access the medical records of patients whom they do not X-ray or why it would have been helpful to speak with Roe's mother-in-law. Liebowitz said, "I don't even understand what you're talking about. I don't know anything about this case." When Roe explained what she was talking about, she was told to leave the call. This meeting, like those which preceded it, suggests that the Respondent was only concerned about concocting a reason for discharging an excellent employee and not concerned about facts that might render such action unnecessary.

The Respondent's subsequent confusion regarding Roe's alleged misconduct also reflects the pretext of its justification for discharging her. In its submission to the NYAG, the Respondent identified Roe's only HIPAA breach as an "Unauthorized Access" (not an inappropriate disclosure), but indicated that the breach occurred on April 27 (when Roe's mother-in-law spoke to Feline) instead of April 15 (when Roe accessed Mr. F's chart). The Respondent could not keep its own story straight.

The Respondent's dealings with other radiology techs after Roe was discharged is also indicative of pretext and a discriminatory intent. After Roe was discharged, Saeli and other radiology techs refused to answer questions which required them to access the charts of patients they did not X-ray or scan (for fear that, like Roe, they would be discharged). The techs' refusal to perform this function was sufficiently disruptive of the hospital's operation as to cause Molleda and Yates to meet with them. At this meeting, Saeli specifically asked Molleda what would happen if (like Roe) she accessed the records of such a patient and could not remember, when questioned 2 weeks later, why she did it. Molleda had no answer other than to repeatedly assure the techs that they could access the records of any patient if it pertained to their jobs. By this exchange, the Respondent effectively admitted that techs would not be disciplined if they were placed in the same situation as Roe. It is appropriate to conclude that the Respondent had no intention of discharging techs in such situations unless, like Roe, they were closely associated with the Union.

Based upon the foregoing, I find that the General Counsel presented a strong prima facie case that the Respondent discharged Roe because of her union support and activity.

The Respondent's *Wright Line* Defense

The Respondent did not establish an affirmative defense that it would have discharged Roe regardless of her union activity. Such a defense is not available to an employer when the evidence indicates that its stated reason for discharging an employee is mere pretext for a discriminatory motive. Rather, the Respondent must establish that it had an honest nondiscriminatory reason that contributed to the termination.

Here, as discussed at greater length above, the record is replete with evidence that the Respondent's stated reason for discharging Roe was a pretext for antiunion discrimination. The Respondent did not talk to Roe or take any action to prevent her from "updating" her mother-in-law on Mr. F's condition until after Roe attended the ballot count. The Respondent then conducted a half-fast investigation in which it ignored and did not seek evidence that might mitigate against a finding of misconduct. The Respondent also effectively forbid Roe from investigating the matter herself. The Respondent excluded Yates (who largely corroborated Roe during the May 4 meetings) from the May 7 meeting which resulted in a preliminary decision to discharge Roe. The Respondent did not introduce any evidence of the final discharge decision. Given the nature of the investigation and alleged decision, it is perhaps unsurprising that the Respondent was confused about its own finding of misconduct. After Roe was discharged and radiology techs stopped accessing the medical records of patients they did not X-ray or scan, the Respondent effectively assured them that they would not be discharged for the same reason as Roe. This evidence suggests that the Respondent's stated reason for discharging Roe was mere pretext for a discriminatory decision based on Roe's union support and activity.

Even if I were to accept that the Respondent had an honest non-discriminatory reason which contributed to Roe's discharge, I would not find that the Respondent proved it would have discharged Roe regardless of her union support and activity. As Campbell admitted, the Respondent's Code of Conduct does not require an employee to be discharged for a HIPAA violation. Although Campbell testified that employees are not discharged when the HIPAA violation is unintentional, the evidence indicated that two employees were not discharged for intentional violations. One employee received a final warning for intentionally accessing the medical records of a co-worker in order to obtain that employee's telephone number and another employee received a final warning for intentionally posting information about a patient on Facebook. Neither employee was discharged. Accordingly, the Respondent did not establish that it would necessarily have discharged Roe for conduct it characterized as intentional.

It is also important to differentiate between Roe's conduct and the conduct of the one other discharged employee whom managers discussed on the May 7 conference call. The other employee was discharged on December 2, 2019 after she "accessed a patient medical record that [she] had no legitimate reason to access and . . . shared information about the patient with another person." Conversely, prior to her discharge, Roe vehemently denied she shared information about Mr. F with her mother-in-law and the Respondent never concluded that she did. The Respondent reported no such breach to the NYAG and only advised Mr. F in a letter that information "may have been disclosed." Likewise, Molleda's summary of the May 7 call only described a "potential disclosure." (Jt. Exh. 10) (Tr. 146-147) The Respondent also failed to explain why it rejected evidence (from Roe, Saeli, and Yates) that techs are routinely asked to access the charts of patients they do not X-ray or scan, particularly at the start of a shift (in this case - 8:26 a.m.). And after other techs began refusing to access such medical records, the Respondent assured them they could do so *even if*, like Roe, they could not remember 2 weeks later why they did it.[11] Thus, the Respondent did not establish that, like the other employee who was terminated, Roe "had no legitimate reason to access" records or "shared information about the patient with another person." The burden is on the Respondent to establish a *Wright Line*

[11] No manager ever indicated they were surprised that Roe, on May 4, could not recall having accessed Mr. F's chart on April 15. As Roe credibly testified without contradiction, techs perform imaging on about 20-30 patients per day and access medical records all day long. It is not surprising that, on May 4, Roe could not recall, when asked, whether she accessed the medical records of a single patient during a one-minute period 17 days earlier.

affirmative defense and, here, it failed to do so.

Based upon the foregoing, I reject the Respondent's *Wright Line* defense to the General Counsel's strong prima facie case. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Roe because of her union support and activity.

CONCLUSIONS OF LAW

1. The Respondent, St. Anthony Community Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, by Robert Yates, in about mid-April 2021, violated Section 8(a)(1) of the Act by interrogating Jeanne Saeli regarding the identity of the "ringleader" of the union organizing campaign.

3. The Respondent, on May 14, 2021, violated Section 8(a)(3) and (1) of the Act by discharging Andrea Roe because of her union support and activities.

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent, St. Anthony Community Hospital, engaged in unfair labor practices, I shall order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully discharged Andrea Roe because of her union support and activities, must offer her reinstatement to her former job or if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges she enjoyed.

The Respondent shall make Roe whole for any loss of earnings and other benefits resulting from her discriminatory discharge. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Scoopers, Inc*., 364 NLRB No. 93 (2016), the Respondent shall compensate Roe for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, and compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Roe for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 2 a report allocating backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), the Respondent will file with the Regional Director a copy of Roe's W-2 form reflecting the backpay award.

In addition, the Respondent will be required to remove from its files any reference to the unlawful discharge of Roe. The Respondent shall then notify Roe in writing that her unlawful discharge will not be used against her in any way.

The Respondent will be ordered to post, in English and Spanish, the notice attached hereto as "Appendix."

The General Counsel has requested certain remedies beyond the more traditional ones discussed above. Specifically, the General Counsel has requested that the Respondent be ordered to provide consequential damages, a notice reading (along with the distribution of the notice to employees present), and a letter of apology to Roe. I address these remedies below.

It is not clear to me that "consequential damages" involve anything more than what is ordered in the Board's standard make-whole remedy. As the General Counsel stated in its brief, "[t]he Board's standard, broadly worded make-whole order, considered independently of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders." G.C. Brief p. 68. The Regional Director can include in a compliance specification any consequential damages he deems appropriate to make Roe whole. However, since the matter was not litigated before me, the issue of consequential damages is better left for compliance.

I will order the Respondent to read the notice posting and distribute a copy of the notice to each employee present for the reading. The Respondent suspended Roe, the primary employee organizer, just 4 days after unit employees exercised their right to elect a union representative for purposes of collective bargaining, and discharged her shortly thereafter. The unlawful discharge was orchestrated by high-ranking managers including Valerie Campbell (who is now the chief compliance practice and ethics officer for the entire WMHS). This would send "a message to employees that those who supported the Union did so at their own peril." *Gavilon Grain*, 371 NLRB No. 79, slip op. at 2 (2022) quoting *Bozzuto's Inc.*, 365 No. 146, slip op. at 5 (2017). See also *North Memorial Health Care*, 364 NLRB 770, 770 (2016) (notice reading appropriate due in part to timing of the violation and the participation of high-ranking management officials). I also find a notice reading and in-person distribution particularly appropriate here because it mirrors how the Respondent communicated with employees about the Union and union organizing. During the organizing campaign, Yates gave employees flyers designed to convince them to vote against union representation and then verbally echoed the talking points in the flyers to best communicate the message therein to employees. Since the Respondent believed this to be the best method for communicating with its employees, I believe a similar reading and in-person distribution of the notice is the best way to communicate with employees regarding their rights under the Act.

I will not order the Respondent to send a letter of apology to Roe for her unlawful termination. The Respondent is already being ordered to notify Roe in writing that her unlawful discharge will not be used against her in any way. The General Counsel asserts that such a letter would "help assure . . . Roe that she is truly welcome to return to the workplace" (G.C. Brief p. 73) and, in fact, a letter of apology involves an expression of sentiment. However, we do not know what the Respondent's officers, managers, and agents think or feel about this legal decision or the employee they are being ordered to reinstate. They are not required to agree with the decision or like Roe. The Respondent is merely required to honor its obligations under the Act and either comply with this decision or contest it. I do not believe a letter of apology is appropriate and I will not order the same.

On these finds of fact and conclusions of law, and on the entire record, I issue the following recommended order[12]

ORDER

The Respondent, St. Anthony Community Hospital, Warwick, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their union activity.

(b) Discharging employees because of their union support and activity.

(c) In any like or related manner interfering, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Andrea Roe reinstatement to her former position or, if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Roe whole for any loss of earnings and other benefits resulting from the discrimination against her in the manner set forth in the remedy section of this decision.

(c) Compensate Roe for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this order, remove from its files any reference to the unlawful discharge of Roe, and within 3 days thereafter, notify Roe in writing that this has been done and that the discriminatory discharge will not be used against her in any way.

(e) Within 21 days of the date the amount of backpay is fixed by agreement, or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 2 a copy of Roe's corresponding W-2 form reflecting the backpay award.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[12] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Within 14 days after service by the Region, post in English and Spanish at its Warwick, New York facility, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 2021.

(h) Hold a meeting or meetings during work time at its facility in Warwick, New York, scheduled to ensure the widest possible attendance of employees, at which the attached notice marked "Appendix" will be read to employees by Valerie Campbell or an equally high ranking official, in the presence of a Board Agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of Campbell or an equally high ranking official and, if the Union so desires, the presence of an agent of the Union. The Respondent and/or Board agent will distribute the notice marked "Appendix" to employees who attend this meeting or meetings.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C., June 24, 2022.

Benjamin W. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees for their union support and activity.

WE WILL NOT interrogate employees regarding their union activities or the identity of employees engaged in union organizing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Andrea Roe full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Andrea Roe whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest and **WE WILL** also make Andrea Roe whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Andrea Roe for the adverse tax consequences, if any, of receiving a lump-sum backpay award and **WE WILL** file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 2 a copy of Andrea Roe's corresponding W-2 form reflecting the backpay award.

WE WILL remove from our files any reference to the unlawful discharge of Andrea Roe, and **WE WILL**, within 3 days thereafter, notify her in writing that this has been done and that her discriminatory discharge will not be used against her in any way.

St. Anthony Community Hospital

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

26 Federal Plaza #364, New York, NY 11278-0104
(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-278511 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (212) 264-0300.